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BEFORE
THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 656
MOTOR CARRIER BUREAUS—PERIODIC REVIEW PROCEEDING

REBUTTAL COMMENTS OF PACIFIC INLAND TARIFF BUREAU, INC.

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Dated: April 21, 2005

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REBUTTAL COMMENTS OF PACIFIC INLAND TARIFF BUREAU, INC.

Pacific Inland Tariff Bureau, Inc. (PITB) files these Rebuttal Comments in response to the Reply Comments submitted by the U.S. Department of Transportation (hereinafter "DOT") and jointly on behalf of the National Small Shipments Traffic Conference, Inc., and National Industrial Transportation League (hereinafter "NASSTRAC/NITL" or "Associations"). Attached hereto is the Verified Statement of Mr. Scott Edwards responding to the Reply Comments, which are the only replies filed in opposition to continued immunity for motor carrier collective ratemaking agreements. Reply Comments have been filed by other motor carrier bureaus in support of continued immunity.[1]

It bears emphasis at the outset that the Associations and DOT have not attempted to address the one question that the Board put forth in commencing this proceeding, i.e., whether anything affecting the public interest has changed since the prior review cycle?

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[1] EC-MAC Carriers Service Assoc., Inc., Middlewest Motor Freight Bureau, Inc., National Classification Committee, Rocky Mountain Tariff Bureau, Inc., Southern Motor Carriers Rate Conference, Inc. In addition, all of the existing bureaus filed Opening Comments in support of continued immunity.

(See Decision served December 13, 2004, p. 2). DOT simply repeats the same institutional opposition to antitrust immunity in general that it has argued for years to no avail. The Associations likewise utter their disagreement over Congress' choice to continue authorizing antitrust immunity for motor carrier collective ratemaking. They also express dissatisfaction with the Board's refusal to adopt their past recommendations.

These arguments, of course, avoid the question at hand as to whether changes have occurred since the last review that warrant imposition of conditions on existing agreements. The failure to address the Board's inquiry leads to the inescapable conclusion that there have been no relevant changes and that the collective ratemaking system is working as the Board envisioned in the last review cycle. Neither DOT's platitudes concerning the benefits of competition nor the Association's efforts seeking reconsideration of their previously rejected arguments demonstrate that agreements so recently approved should now be terminated or restricted.

Unable to convey any changed circumstances that warrant termination or further limitation of immunity, DOT and the Associations attempt to cast on the bureaus the burden to justify continued approval of their agreements. Their argument, however, misreads the statute. Review of approved collective ratemaking agreements is governed specifically by 49 U.S.C. § 13703(c). The statute directs the Board to change the conditions of approval or terminate the agreement "when necessary to protect the public interest". *Id.*, (c)(1). The law further mandates that the agreement "shall be continued unless the Board determines otherwise". *Id.*, (c)(2).

Not surprisingly, the Associations and DOT prefer to ignore this language and instead point to the language in subsection (a)(2) which addresses agreements submitted to the Board for approval. In order to obtain approval, an agreement submitted under that provision requires a finding by the Board that such agreement is in the public interest. A comparison between subsection (a) and (c) indicates that Congress imposed different standards for approved agreements being reviewed for renewal and initial or amended agreements seeking approval. Contrary to the contentions of the Associations and DOT, Congress expressed a presumption in favor of continued approval unless circumstances demonstrate a necessity to protect the public interest.

The difference in language between (a) and (c) is significant as the ICC recognized long ago in examining a similar distinction in former 49 U.S.C. § 10706(b) (applicable to motor carriers) and (c) (applicable to freight forwarders) and holding that the statutory standards for the two are not the same. Under the former, ". . . the Commission must approve a motor carrier rate bureau's agreement unless it finds the agreement would be inconsistent with the NTP. A freight forwarder bureau's agreement, measured by section 10706(c), must further the NTP." (Emphasis in original). See *Household Goods Forwarders Tariff Bureau, Sec. 5a Application No. 106*, 1991 Fed. Car. Cases ¶ 37,917 (1991). (See also the earlier decision reported at 1991 Fed. Car. Cases ¶ 37,903, note 3.) So too here, the difference in standards must be given effect.

Given the structure of section 13703(c), it is apparent that Congress created a presumption in favor of renewal of approved agreements, unless evidence shows that conditions or termination are necessary to protect the public. Of course, there must be a showing that the public is being subjected to some type of conduct that requires

imposition of conditions or outright termination—a showing that has not been made by DOT or the Associations.

Certainly this is not a radical approach. Termination of an agreement is a drastic measure and is not taken lightly. For example, in *Machinery Haulers Association*, 5 I.C.C.2d 808, 812 (1989), termination was justified on the basis of the bureau's consistent noncompliance with the law and the agreement itself:

> Our action here [terminating an agreement] is a drastic one. However, we consider it necessary based on MHA's continuing noncompliance with the law, our regulations and the terms of its own agreement. We have an obligation to ensure the integrity of our process. MHA has consistently demonstrated an inability or unwillingness to comply with the law.

No similar evidence exists here. PITB has strictly adhered to the requirements of the statute, ICC and STB orders, and the terms and conditions of the agreement. Moreover, DOT and the Associations have not identified a single circumstance that has occurred since the last review that would require either the imposition of additional conditions or the draconian measure of termination. Their disagreement with antitrust immunity in general is a matter for Congress, but is plainly insufficient to justify the extreme measures advocated here.

Turning to the substance of the Reply Comments, DOT states that nothing short of disapproval of the agreements will satisfy its concerns. (See Reply, p. 10). This statement reflects a fundamental misunderstanding of the nature of this proceeding. The bureau agreements under review have recently been reviewed and approved. The issue being considered is whether any changes have occurred since the Board's last review that warrant a change in its recent approval. DOT has offered nothing of any relevance in that respect.

The Associations also ignore that question. However, unlike DOT, they would accept continued immunity with additional conditions in lieu of outright termination. However, they too have failed to establish that any additional conditions are necessary for the protection of the public.

The concerns listed at page 2 of their Reply have previously been addressed in our prior comments. More importantly, the Board has previously considered and rejected the Association's requests and no circumstances have been presented to warrant the Board's reconsideration.

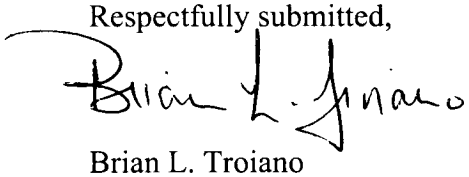
The Associations also comment on and pose questions concerning matters considered by carriers in adopting general rate increases. The purpose of this discussion is left unsaid and is certainly not clear in the context of this proceeding. If the Associations believe that any bureau rate actions are not lawful, the Act provides appropriate avenues to raise those issues.

Finally, the Associations suggest that the Board require the bureaus to file financial and membership information. The only reason provided for this request is to allow the Board and the public "to better monitor the activities and financial position of the various bureaus". (Page 5). The responsibility for monitoring the bureaus is that of the Board. 49 U.S.C. § 13703(b). The Board exercises that authority by requiring the bureaus to maintain and retain specific records. 49 C.F.R. Part 1253. PITB, of course, maintains the required records which are available to the Board for inspection. The Associations would make the Board a repository for the additional information, but fail to provide a sound reason for such a requirement, other than a desire to "monitor" the

bureaus. However, as noted, the statute imposes monitoring responsibilities on the Board—not shippers.

In conclusion, PITB's agreement was amended to comply with the Board's *EC-MAC* decisions and was approved in a decision served January 15, 2004. No circumstances have been shown to indicate that the shipping public is in need of protection from any collective activities conducted by bureau carriers pursuant to their existing agreements. Accordingly, upon concluding its review, the Board should continue its approval of PITB's agreement.

Respectfully submitted,



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VERIFIED REBUTTAL STATEMENT OF SCOTT EDWARDS

I am the same Scott Edwards who has previously submitted statements in this proceeding on behalf of Pacific Inland Tariff Bureau, Inc. (PITB). I have reviewed the statements submitted in this proceeding and offer these comments in response to the Reply Statements submitted by the U.S. Department of Transportation (DOT) and jointly by the National Small Shipments Traffic Conference and the National Industrial Transportation League ("Associations" or "NASSTRAC/NITL").

At the outset, it is important to note that neither statement voices specific problems or objections of actual shippers. I indicated in my last statement that shippers have attended our rate meetings. Based on our experience, shippers are not turning out to complain about PITB's general rate level or the ratemaking process. This is undoubtedly because of the individually negotiated discounts that they are receiving from carriers. As we have reported to the STB for the past 2 years, no customer of PITB carriers whose freight charges are based on PIN 500 rates is receiving less than PITB's minimum discount of 40 percent. In this vein, DOT's comment at page 2 that not all shippers

actually pay a discounted rate indicates that it is out of touch with the current state of the industry. All shippers of PITB carriers are receiving discounts.

The Associations' opposition to continued immunity is not based on any existing problems but rather on potential or hypothetical concerns ("... features of NCC and rate bureau operations that are actually or potentially anticompetitive should be eliminated or minimized". Comments, p. 3). However, their statement is absolutely silent in identifying any of these so-called features that need to be reigned in. The fact remains that the carriers' collective activities are very limited, are conducted in the sunshine, and produce a reasonable rate level that serves as a starting point for individual negotiations that result in a market based rate for the shipper.

Since the Associations are apparently unable to identify any actual problems resulting from approved carriers collective activities, they pose certain questions concerning the formulation of general rate increases (See Comments, p. 4). Given the apparent lack of interest in our GRI's over the last several years, their questions are somewhat surprising. Moreover, as we have maintained throughout this proceeding, we do not consider GRI issues to be relevant to the questions identified by the Board. In instituting this proceeding, the Board defined the issue in this proceeding to be a review of bureau agreements and explained that it is interested in whether anything has changed since the last review cycle that would affect the public interest. The Associations and DOT have ignored this request and rolled out the same arguments made and rejected over the years.

With that said, I turn briefly to the Associations' questions with respect to fuel cost increases, they are not a component of our general increases. PITB maintains a

separate fuel surcharge tariff item that is specifically indexed to regional diesel fuel price information provided by the U.S. Department of Energy and is updated weekly. As the reported fuel price changes, the surcharge percentage changes. Simply put, fuel price increases are not taken into account in a general increase and any suggestion that PITB carriers might be engaged in some type of double recovery of increased fuel costs is flatly wrong.

The Associations also assert that the bureaus other than SMC are conspicuously silent in this proceeding on the basis for their GRI's. (Comments, p. 4). As noted, we have no reason to believe that this is an issue in this proceeding. In any event, I have previously explained that PITB notices all meetings of its General Rate Committee beyond the requirements of law. Those meetings are open to the public and anyone can attend to learn and understand the basis for general increases. PITB does not rely on indices, but instead uses actual carrier operating costs, both labor and non-labor, obtained from written surveys sent to and returned by our members. Our GRI's therefore cover actual operating costs as well as carrier revenue need. General rate increases accurately reflect actual carrier experience with respect to their own operating costs and revenue requirements to produce a reasonable benchmark level. Of course, competition in the relevant market in which each carrier operates dictates the discounts that each carrier negotiates with and offers to the customers.

The Associations and DOT also urge that continued antitrust immunity cannot be justified on the basis of joint line service and rates. Their view is directly at odds with what Congress has already determined. Beyond this, their contention reflects an ivory tower approach to the real world in which carriers must deal on a daily basis. PITB's

member carriers are primarily small to medium size companies that operate on a regional basis. Their ability to provide long haul service depends on joint line arrangements with other carriers. In order to perform an economical, efficient, seamless service it is essential that they have in place the rates and services that all participants have agreed upon in advance. Significantly neither the Associations nor DOT question the benefits of joint line service. Instead they simply suggest that the risk of antitrust action is remote and therefore immunity is unnecessary. This contention is little comfort to carriers and again reflects an academic approach that ignores reality. Carriers facing antitrust exposure are more likely to drop the service than take the risk.

The Associations also advocate that the bureaus be required "to submit regular financial and membership reports to the Board and the shipping public to better monitor the activities and financial position of the various bureaus." (Comments, p. 5). PITB presently maintains all of the records required by the Board's regulations and they are available for inspection by the Board. Further, as we have emphasized throughout this proceeding, our rate meetings are open to the public and any interested person who cares to monitor our activities is, and always has been, welcome to attend.

The Associations and DOT argue that motor carrier rates should be set through competition and negotiations in a deregulated marketplace. Whether the marketplace should be totally deregulated is a matter for Congress. Moreover, the rates actually paid by shippers are presently set through competition, i.e., the discounts set by individual negotiation.

VERIFICATION

I, Scott Edwards, declare and verify under penalty of perjury under the laws of the United State that the foregoing is true and correct. Further, I certify that I am qualified and authorized to submit this statement.

Dated: 4-15-05

(Signature)